

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Trevolin Reid

v.

David Smith and Jennifer Bull

BEFORE: MASTER R. A. MUIR

COUNSEL: Jillian Van Allen, counsel to the lawyer for the plaintiff
Joe Bowcock for defendant David Smith

REASONS FOR DECISION

[1] The plaintiff brings this motion pursuant to Rule 37.14 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194 (the “Rules”) for an order setting aside the order of the registrar dated March 28, 2014, dismissing this action as abandoned. The plaintiff also seeks an order validating and extending time for service of the statement of claim on the defendant David Smith and an order to continue against Mr. Smith’s estate.

[2] The defendant Smith is opposed to the relief sought by the plaintiff. The defendant Jennifer Bull takes no position on this motion.

[3] This action arises from a motor vehicle accident that took place on August 6, 2011. The plaintiff was a passenger in a vehicle driven by the defendant Jennifer Bull. It is alleged that Mr. Smith failed to stop at a red light and collided with Ms. Bull’s vehicle. Mr. Smith was charged with failing to stop for a red light under the provisions of the *Highway Traffic Act*, RSO 1990, c H.8 (the “HTA”).

[4] The law relating to motions for an order setting aside an administrative dismissal order is not in dispute. The test is well known and is summarized in the Court of Appeal’s decision in *H.B. Fuller Company v. Rogers (Rogers Law Office)* 2015 ONCA 173 at paragraphs 20-28. Four factors are of central importance. The court must consider the explanation for the delay, whether the deadline was missed due to inadvertence, any

delay in bringing the motion to set aside the dismissal order and prejudice to the defendant. Prejudice is the key consideration.

[5] The Court of Appeal's decision in *MDM Plastics Ltd. v. Vincor International Inc.*, 2015 ONCA 28 is also important. That decision appears to add a measure of refinement to the test. The court held that in most cases, the issue of prejudice figures largely in determining whether to set aside a dismissal for delay. See *MDM* at paragraph 24. The Court of Appeal emphasized that judges and masters must balance any prejudice to a defendant against the prejudice to the plaintiff from having the case dismissed. See *MDM* at paragraph 26.

[6] Ultimately, the court must take a contextual approach and consider all of the circumstances of each particular case and make the order that is just. See *MDM* at paragraph 12. In doing so, the court must balance the right of a party to a determination of his or her claim on its merits with the important principle that actions should be resolved in a timely and efficient manner. However, the preference in our system of civil justice is for a determination of disputes on their merits. See *Fuller* at paragraphs 25-27.

[7] These are the factors and principles I have considered and applied in determining the issues on this motion. Despite certain shortcomings with the plaintiff's lawyers' conduct of this action, it is my view that it is just in the circumstances that the dismissal order be set aside.

[8] In my view, the plaintiff has failed to adequately explain the litigation delay and satisfy the court that this motion was brought promptly. The plaintiff and his lawyers knew that a motion was necessary to deal with the service difficulties regarding Mr. Smith but little was done to bring such a motion in a timely manner. The same is true for the order to continue necessitated by Mr. Smith's passing on December 14, 2013 and for this motion to set aside the registrar's dismissal order. I do not suggest that nothing was done, but the steps taken were obviously ineffective and ill-advised. They were highlighted by a number of starts and stops and what I view as a lack of focus and diligence necessary to address the urgent matters at hand. The plaintiff's lawyers failed to take steps to extend the Rule 48.15 dismissal date after receiving a notice from the court. They sought an order to continue when they knew the action had been dismissed. After the request for an order to continue had been rejected, the plaintiff's lawyers allowed many months to pass before serving a notice of motion seeking an order setting aside the administrative dismissal order.

[9] I accept that the plaintiff's lawyers were taking some steps to advance this claim. A great deal of medical and other evidence was assembled and provided to the insurers for the defendants. The plaintiff's lawyers were in early and regular contact with the defendants' insurers and lawyers both before and after the claim was issued. However, very little was done to advance this action in terms of what needed to be done under the Rules and waiting for more than a year to bring this motion cannot be viewed as "prompt" in the circumstances. These factors have not been satisfied.

[10] However, I accept that the plaintiff's failure to take steps to address the pending dismissal of this action must have been inadvertent. The plaintiff's lawyer requested the defendants serve notices of intent to defend after receiving the court's warning notice. The plaintiff's lawyer continued to deal with the issues involving the order to continue. Communications continued with defendants' counsel. I note that the plaintiff and the plaintiff's lawyer have stated in their affidavit evidence that they always intended to continue with the action. The failure to take steps to avoid the dismissal as abandoned must have been inadvertent. No other explanation makes sense.

[11] The plaintiff has also met his onus with respect to the issue of prejudice. It appears unlikely, from the evidence before me on this motion, that liability will be a serious issue. The plaintiff was a passenger in Ms. Bull's vehicle. Mr. Smith was charged with a violation of the HTA. There is no evidence from Mr. Smith's insurer that their investigation suggested liability may lay elsewhere. I note that Mr. Smith's insurer was aware of this potential claim within a few months of the accident and well before Mr. Smith passed away. Mr. Smith's insurer had ample opportunity to conduct an early and full investigation.

[12] Mr. Smith is deceased and not available to give evidence. However, he passed away prior to the expiry of the time under the Rules for service of the statement of claim. Any prejudice arising from Mr. Smith's passing will obtain regardless of the plaintiff's delay.

[13] Finally, it is abundantly clear that the important evidence has been preserved and produced. This evidence includes the plaintiff's medical and income loss documents going back many years. The plaintiff is available to be examined for discovery and to submit to defence medical examinations.

[14] I agree with counsel for Mr. Smith that the passage of time will obviously affect the memories of witnesses and their recollection of events. Nevertheless, given the extent of the preservation of the plaintiff's evidence and the nature of the matters likely to be in issue in this action, I am satisfied that the defendants will be able to defend themselves at trial.

[15] I do not view it as helpful in the circumstances of this action to engage in speculation about any potential claim by the plaintiff against his lawyers. The current view of the Court of Appeal emphasizes that the court should focus on the rights of the litigants and not errors committed by counsel. See *Fuller* at paragraph 27.

[16] As a final point, I would note that the delay to date has not been inordinate in terms of the new timelines under the amended version of Rule 48.14. This is an appropriate factor to consider as part of the contextual analysis. If Ms. Bull had simply served a notice of intent to defend in March 2014, this action would not have been administratively dismissed until August 2018.

[17] For all of these reasons, I have concluded that it is just in the circumstances of this action that the dismissal order be set aside. The parties agree that the relief with respect to service on Mr. Smith should follow the result on the dismissal order aspect of this motion.

[18] I therefore order as follows:

- (a) the order of the registrar of March 28, 2014 is hereby set aside and the registrar shall not dismiss this action for delay before August 3, 2018;
- (b) time for service of the statement of claim on Mr. Smith is extended and service is validated by service upon Smockum Zarnett LLP as of August 6, 2015;
- (c) the relief with respect to the order to continue is adjourned to be heard by me by way of a telephone case conference to be arranged with counsel; and,
- (d) the parties agree that there shall be no order for the costs of this motion.

Master R.A. Muir

DATE: September 9, 2016